
IN THE

Supreme Court of the United States

OCTOBER TERM, 1912

No. 120

LOUIS BOCHARDER,

Petitioner.

v.

PEOPLE OF THE STATE OF NEW YORK.

**PETITION FOR A WRIT OF CERTIORARI TO THE
COUNTY COURT OF KINGS COUNTY, STATE OF
NEW YORK, AND BRIEF IN SUPPORT THEREOF**

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STATE OF NEW YORK**

LOUIS BUCHALTER prays that a writ of certiorari issue to review the judgment of the County Court of Kings County of the State of New York entered December 2, 1941, convicting petitioner of the crime of Murder in the First Degree. On October 30, 1942, that judgment was affirmed by the Court of Appeals of New York, which is the Court of last resort of that State. Petitioner moved for a re-argument in the Court of Appeals, which, on November 25, 1942, was denied.

Statement

In April, 1940, while petitioner was a prisoner of the Federal Government, incarcerated in the United States Penitentiary at Leavenworth, Kansas, serving a sentence of imprisonment for a term of fourteen years, which had been imposed upon him in the United States District Court for the Southern District of New York in December, 1939,

an indictment was returned in the County Court of the County of Kings, State of New York, wherein petitioner, with others, was charged with the murder of Joseph Rosen on September 13, 1936. In addition to the sentence which he was then serving, petitioner was under sentence for a term of thirty years to life, imposed upon him by the Court of General Sessions of the County of New York, State of New York, in March, 1940, the service of which sentence was to commence upon the expiration of the Federal sentence.

In May, 1941, petitioner was transferred from the Federal penitentiary at Leavenworth, Kansas, to the Federal Detention Headquarters in the City of New York, and thence taken into the County Court of the County of Kings for arraignment on the indictment, charging him with Murder.

Simultaneously with the announcement of the indictment against him, the prosecutor commenced the use of every available method to have him prejudged by the community in which ultimately, in September 1941, he was brought to trial. So successful were these efforts that, when the trial actually began, it was only a pretense of a trial. By September 1941, he had been characterized repeatedly in every important newspaper circulated in the City of New York as society's most vicious enemy, the arch criminal of his time, a racketeer who had extorted millions and was intent on extorting billions from the business and industrial community of New York, as the arch assassin who employed the members of a notorious group of murderers, first to kill all who opposed his unbounded predatory schemes, and then all who, however innocently, might have been witnesses of his acts of violence (see newspaper clips submitted herewith). The District Attorney permitted himself to be quoted repeatedly by the most staid of the metropolitan papers, *The Times*, *The Sun*, *The Herald-Tribune*, to the effect that he, the District Attorney, was jubilant because he had an iron clad case of murder against the

petitioner. Newspaper articles which assumed petitioner's guilt of murder as charged by the indictment, quoted the District Attorney in discussing the case. The attack on petitioner, the complete devastation of the presumption of innocence to which he was entitled even during the trial, let alone before its beginning, was carried by the prosecution to the point of releasing announcements to the press to the effect that petitioner had actually acknowledged his guilt of the crime charged in the indictment and, in order to avoid execution, was bargaining with the District Attorney to turn state's witness against men who held high office in the Governments of the City of New York and the United States.

While these attacks on petitioner were proceeding, newspaper propaganda, especially in Brooklyn, idolized the District Attorney for his attack on petitioner. These separate newspaper campaigns, one in attack upon petitioner, the other in praise of the prosecutor, reached their climax in September, 1941, when petitioner's trial began. The prosecutor had then become the Democratic candidate for the office of Mayor of the City of New York. His political opponent, the incumbent Mayor, Mr. LaGuardia, was supported by the American Labor Party, in whose membership the Amalgamated Clothing Workers' Union was an important factor. In at least one of its aspects, petitioner's trial represented an attack upon that Union. Petitioner contends here, as he contended below in the Courts of New York, that the prosecutor succeeded in creating assurance of his guilt in the minds of the community in which he was to be tried before his trial began, and that in consequence he received not a fair trial, but only a simulacrum thereof.

In an effort to obtain a fair trial, petitioner applied (R. 76 *et seq.*) to the Supreme Court of New York for a change of venue, and in support of that application submitted a few of the many hundreds of inflammatory, prejudicial articles which had been circulated against him. These, therefore, are part of the record and quick reference is

here made to some of them (the articles themselves forming a part of the record are submitted in the same photostatic forms in which they were presented at *nisi prius*). While inclusion of these excerpts will extend the length of this petition, counsel does so in the hope that the effect will be to serve the convenience of the Court.

The Sunday edition of the *New York Daily News* published April 7, 1940, printed a three-page resumé of the alleged scope of the activities of a group of professional murderers. Purporting to quote the District Attorney, the paper said:

"All in all, O'Dwyer figures, Crime Corp. eliminated seven of the 11 witnesses against Louis (Lepke) Buchalter and Jacob (Gurrah) Shapiro in District Attorney Dewey's investigation of their racket activities."

The paper said of the crime charged in this case:

"Joseph Rosen, slain in his Brooklyn candy store in September, 1937. Rosen had been a truck fleet operator, but was driven from business by rackets. The Lepke-Gurrah combination was said to fear his testimony in front of District Attorney Dewey and for that reason contracted to have him killed. Pittsburgh Phil Strauss and Happy Maione were arrested in this case, and soon were freed."

Much of the article purports to quote the District Attorney. It carries his disclaimer of political ambition (*sic*). At about the same time, the *News* revealed that the District Attorney had been informed by the Federal Bureau of Investigation that petitioner employed the same murder syndicate, that witnesses "delivered murder contracts from Lepke (petitioner) to Albert Anastasio, also a fugitive. 'If Workman can be induced to talk', an official said, 'both Lepke and Anastasio will die in the electric chair'." Then one month after the indictment, in May, 1940, prosecutors of both Kings County and Bronx County in metropolitan

New York began to be quoted as being certain of petitioner's guilt of many murders. On January 3, 1941, the *New York Herald-Tribune* quoted Samuel J. Foley, District Attorney of the Bronx, about the murder of one Pean: "We now have a clear picture of the entire set-up", Mr. Foley said. "I believe Lepke ordered the disposition of Orlovsky and the job was bungled. There is no doubt the murder was done on the order of the gang chieftain."

On June 4, 1940, the *Daily Mirror*, after stating that the District Attorney of Kings County was at Monticello, New York, where he had brought witnesses to testify about the murder of one Yuran, said:

"Yuran, a wealthy dress manufacturer, whose body buried in quicklime, was found at Loch Sheldrake in April, was killed on orders of Louis (Lepke) Buchalter with whom he had been indicted in New York for industrial racketeering, authorities said."

On May 16, 1940, the *New York Times*, after referring to Mr. O'Dwyer's presence in Sullivan County at the excavation of Yuran's body, said:

"Yuran is believed to have been slain by the murder ring at the behest of Lepke in the summer of 1938, at which time Lepke allegedly was directing a 'war of extermination' against all potential witnesses in Mr. Dewey's inquiry."

Petitioner was removed from the Federal Penitentiary at Leavenworth, to the Federal Detention Headquarters at New York City in May, 1941, pursuant to a writ *ad prosequendum* sought by the District Attorney of Kings County and consented to by the Attorney General of the United States. This was made the subject of new, completely artificial, propaganda circulated even by the most conservative elements of the press. On May 25, 1941, the *New York Sun* said:

"RELES IS TAKEN TO HOSPITAL.

Fear of Accusing Lepke as Witness at Trial Blamed for Pleurisy Attack.

The prospect of testifying against such an underworld big shot as Louis (Lepke) Buchalter has made Brooklyn's star informer, Abe (Kid Twist) Reles, severely ill.

Reles, whose testimony has already sent four men to the death house at Sing Sing, has become so unnerved by the realization that he soon will be required to accuse Lepke in the same way that he has had to be taken to a private sanitarium in Manhattan, seriously ill of pleurisy. The New York Sun was informed today.

There can be no doubt that it was fear of facing Lepke in open court that brought on Reles's relapse, it was said. He has been suffering from a serious disease for several years and six months ago doctors gave him only two years to live. It is said that for this reason District Attorney William O'Dwyer speeded up prosecution of the murder syndicate and made swift moves to get Lepke back from the Federal Penitentiary at Leavenworth, Kan., to stand trial for the murder of Joseph Rosen, a Brooklyn shopkeeper, in 1936. Reles is the kingpin of the District Attorney's case against Lepke.

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Reles has been District Attorney O'Dwyer's star witness both in the trial of Harry (Happy) Maione and Frank (The Dasher) Abbandando, and in the trial of Harry (Pittsburgh Phil) Strauss and Martin (Bugsy) Goldstein, all of whom are now awaiting death at Sing Sing.

Reles showed no particular compunction about testifying against Maione, Strauss, Abbandando and Goldstein. He was of their caste in gangland, but when he takes the stand against Lepke he faces the czar of the underworld realm. It was Lepke, according to the testimony, who ordered the killings which the murder syndicate did for a price, based on a very elaborate scale of rates.

One informant of The New York Sun said that it was like the office boy testifying against the boss. The mere thought of the ordeal was too much for Reles, he asserted."

The same newspaper account, certainly by advisement, since it could not have been through inspiration, said of the charge confronting petitioner:

"Lepke is under indictment for the shooting of Rosen in front of the latter's stationery store at 725 Sutter Avenue, the Bronx, on September 13, 1936. Rosen had written a letter to District Attorney Thomas E. Dewey in New York county offering to give evidence in the prosecution of the trucking racket of which Lepke was the czar. Rosen was struck down by twenty-two bullets."

The District Attorney of Kings County assured the newspapers, who in turn assured the public, that petitioner was guilty not only of the crime of murder in contriving the assassination of Joseph Rosen, but of other murders. On April 14, 1940, the *Daily News* said of petitioner:

"PRISON TO CHAIR, PLAN FOR LEPKE.

Aids of Kings County District Attorney William O'Dwyer revealed yesterday they will move to rescue Louis (Lepke) Buchalter from his lifetime sentence in prison. They hope to electrocute him instead.

The deposed industrial racketeer, they declared, has now been linked definitely to two killings perpetrated by Brooklyn's murder ring. On the strength of the evidence, O'Dwyer will move to have Lepke brought back from the Federal Penitentiary in Lewisburg, Pa., to stand trial for his life.

The final tie-up between Lepke and the murder mobsters has been provided, according to O'Dwyer's men, by a former member of the gang. Significantly, Assistant District Attorneys Louis Aldino and Edward A. Heffernan went to Sing Sing late in the afternoon to interview a prisoner. This was the third time they had been closeted with the convict, who is said to be talking freely.

The murders for which Lepke will be called upon to stand trial are those of Morris Diamond, business manager of Local 138 of the Teamsters Union, and Joseph Rosen, candy store proprietor, who had been forced out of the trucking business by the Buchalter combine.

Diamond was fatally shot at 69th St. and 18th Ave., Brooklyn, last May 25, after he had been questioned about truck racketeering at the offices of the Manhattan District Attorney. He was under subpoena for a second appearance when he was slain.

Rosen also had been quizzed by the authorities and was to be interrogated again when four gunmen entered his store at 725 Sutter Ave., Brooklyn, on Sept. 13, 1936. They pumped bullets into him and fled.

The prosecutor not only assured the public of petitioner's guilt, but proceeded to quote a purported acknowledgment by him of guilt. On October 31, 1940, the *New York World-Telegram* said that Mr. O'Dwyer announced to the press that he had developed an iron-clad case of murder against petitioner; that he had discussed the facts of the case with petitioner at Leavenworth, and that petitioner having acknowledged his guilt to the District Attorney had agreed "to buy his life by turning state's evidence as the far lesser Abe Reles and small fry of Murder, Inc. already have done". The article continued:

"It is known that Mr. O'Dwyer and Captain Frank C. Bals, who commands detectives working on the Murder, Inc., case, left Brooklyn together on Oct. 22 for Kansas City.

And today it was reported that Mr. O'Dwyer made two secret journeys to Leavenworth to talk with Lepke before he and Captain Bals returned to the city last Monday.

Previous Report.

It had been previously reported that Lepke probably would talk if that was the only way he could escape the chair, but today's information is the first definite report from a source of such reliability that Lepke's singing was assured.

The argument that convinced Lepke to spill all he knows, to bring to light the deepest secrets of the big shots of the underworld and their alliances with politics, is reported to have been the first degree murder indictment obtained against him by Mr. O'Dwyer.

Mr. O'Dwyer's investigation of Murder, Inc., revealed evidence that Lepke had given 11 murder contracts to this syndicate of retailers of homicide and that seven of the murder orders had been executed satisfactorily.

The indictment against Lepke was for one of these crimes—the slaying of Joseph Rosen to shut his mouth so he could not testify against Lepke.

Victim of Extortionists.

Rosen was forced out of the trucking business by Lepke's extortionists. He was reduced to running a small candy shop at 725 Sutter Ave., Brooklyn. That was where he was killed Sept. 13, 1936. He had a subpoena to appear before the Dewey grand jury in his pocket when gunmen walked in and fired 22 bullets into his body.

Even this did not shake Lepke's silence, as far as could be learned. But then Assistant District Attorney Louis Aldino obtained important corroborative evidence against Lepke and the five men indicted with him for the Rosen Murder. The nature of this evidence is still a closely guarded secret, but it was important enough to cause Mr. O'Dwyer, to exclaim jubilantly:

'At last I've got Lepke and Capone on their way to the chair.'

And whatever the evidence was, it is reported, it was enough to convince Lepke that his only chance to escape frying in the hot seat was to sing—and sing loud."

The *World-Telegram* story of October 31, 1940, was not a reporter's "scoop". The same story appeared that evening in the conservative *New York Sun* under these headlines:

"LEPKE TO BLOW UNDERWORLD'S LID OFF SOON.

Racket Boss Is Reported as Fearful of
Death in Electric Chair.

O'Dwyer Shapes His Case.

Brooklyn District Attorney is Gathering
Evidence About Candy Shop Murder."

The *Mirror*, a tabloid, on the same day carried this headline:

"REPORT LEPKE WILL 'SING' TO ESCAPE CHAIR."

And said:

"Louis (Lepke) Buchalter was officially reported last night to be ready to buy his life by revealing to District Attorney O'Dwyer of Brooklyn all he knows about the underworld.

The report became public following disclosure that O'Dwyer and a high police official have made two secret trips to Leavenworth prison to talk with Lepke.

O'Dwyer recently had the racketeer indicted on the charge of directing the murder of Joseph Rosen in Brooklyn in 1936, one of the 'contract' slayings of the Brooklyn Murder Syndicate. Rosen, formerly in the trucking business but later owner of a small candy store at 725 Sutter Avenue, had been subpoenaed by a Dewey Grand Jury investigating Lepke's activities, when gunmen entered his store and shot him 22 times.

Lepke, under a Federal sentence of 14 years for smuggling dope, and facing an additional 30 years as a trucking racketeer, was declared ready to break his stubborn silence after learning O'Dwyer has obtained important evidence against him in the Rosen murder. Realizing that O'Dwyer is determined to send him to the chair, Lepke decided to follow the example of Abe Reles, former executive of the Murder Syndicate, and 'sing'.

He is said to be ready to tell the inside story of crime as Big Business. 'Big Shots' hitherto immune may be exposed. Officials who have made integrated

criminal operations possible on a nation-wide scale are to be identified publicly, Lepke is said to have promised.

Indicted with Lepke in the Rosen murder was Louis Capone, now in Raymond St. jail, Brooklyn.

'At last I've got Lepke and Capone on their way to the chair,' O'Dwyer was reported to have declared before Lepke decided to talk. No hint was forthcoming from O'Dwyer's office last night whether he is willing to bargain with the kingpin racketeer.

Capone is described as the go-between who handed out the Lepke 'contracts' to the Brooklyn syndicate. According to one report, he contributed the corroborative evidence in the Rosen murder."

On April 15, 1940, the *New York Mirror* said of a then current murder trial, that the crime had been committed at petitioner's direction. The article said in part:

"The specific charge is the slaying of George Rudnick, a police informer, found stabbed 54 times with an ice pick, in his car on Jefferson Ave. between Central and Evergreen Aves., Brooklyn. In a pocket of Rudnick's coat was a letter, signed by an investigator, thanking Rudnick for 'the information you gave me'. Authorities assert Louis (Lepke) Buchalter ordered the killing and that the letter was put there on Lepke's order as a threat to other informers."

On April 15, 1940, the *Times*, in an article based on an interview with the District Attorney of Kings County, referred to petitioner's co-defendant in this case, Capone, as "the go-between who accepted orders from Lepke and other gangsters for murders they wanted performed and passed the orders on to the actual killers". The article said that Penn had been murdered because gangsters had confused him with Orlovsky, "a witness against Louis (Lepke) Buchalter in District Attorney Thomas E. Dewey's investigation of Lepke's racket empire".

On April 13, 1940, the *New York Mirror* said:

"LEPKE LINKED TO SYNDICATE KILLING.

Louis (Lepke) Buchalter was directly implicated yesterday in a Brooklyn murder syndicate execution, according to an announcement from District Attorney O'Dwyer's office."

The article quoted an affidavit supposedly in the possession of the prosecutor which charged petitioner with the murder of one Diamond.

On April 16, 1940, the New York press again purported to relate secret proceedings in the office of the District Attorney of Kings County, and said in part:

"Meanwhile, the puppet-master Louis (Lepke) Buchalter was spot-lighted today in new developments in the Brooklyn probe into Murder, Inc., when a 'singing' ghost linked the racketeer to still another murder.

Now Linked to Three.

Buchalter was connected Saturday with two killings, either of which may lead to first degree murder indictments and eventually to the Sing Sing death house. A third was uncovered yesterday and linked to the arch-plotter and today the whole force of Kings County District Attorney William F. O'Dwyer's inquiry was turned on strengthening his case against Lepke.

Mr. O'Dwyer's men were out today to locate two key witnesses to fill in the details in the picture painted of Lepke's homicidal past. One of the witnesses is a former school teacher turned racketeer and the other one of Lepke's former errand boys.

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Teacher-Gangster.

The first witness sought by Mr. O'Dwyer's men, the former school teacher, abandoned his profession to turn racketeer and link himself with Lepke. He turned on Lepke after a friend of his was slain.

The second man was a bail bondsman who served Lepke as an errand boy."

Petitioner asserts that the references, in this and many similar articles, to missing witnesses were falsely and calculatedly made for the purpose not only of preparing public sentiment against him, but as a prelude to the introduction upon his trial of the witness Rubin whose perjury was important in the establishment of a *prima facie* case against petitioner.

On May 20, 1940, the *New York Mirror* quoted an official as asserting that the authorities had received conclusive proof of "a direct tie-up between the Brooklyn Murder Syndicate and Louis Lepke Buchalter * * *."

On August 6, 1940, the *Mirror* quoted the trial assistant for the District Attorney as assuring a Supreme Court Justice that a female witness could not be released for fear that "she too might be executed on orders from Lepke". Petitioner was then, as he had at all times since 1939 been, in the custody of Federal authorities.

On May 16, 1941, petitioner was arraigned upon the indictment on which he was subsequently tried. On that same day the *New York World-Telegram* said of him:

"LEPKE WOULD TELL OF U. S. CRIME RING.

Official, Labor Chief Might
Be Implicated.

Louis (Lepke) Buchalter is negotiating to turn informer and betray the inmost secrets of the magnates of crime who dominate the rackets of America, the *World-Telegram* learned today.

This newspaper learned that squealers have informed District Attorney William O'Dwyer that Lepke was in a position to deliver a nationally prominent labor leader on a murder charge, a noted public official of New York City on a conspiracy charge, and a close relative of a very high federal office holder as a front man for at least two of the six men credited with controlling racketeering throughout the United States.

Before he was laid by the heels on a federal dope ring conviction Lepke was one of the most powerful

racketeers in the country, a member of the highest council of the rackets industry. And if Lepke really talks, the lid's off the underworld.

The status of the negotiations remained a closely guarded secret today, but the World-Telegram learned that already there have been a series of conferences between representatives of District Attorney William O'Dwyer of Brooklyn and Lepke's relatives and attorneys.

Lepke's price is freedom from prosecution on the murder charge he now faces in the Murder, Inc. debacle in Brooklyn and commutation of the 30-to-60-year sentence hanging over him for extortion in the flour-trucking industry in Manhattan, the World-Telegram is informed.

If he got his price Lepke would be a free man when he finished his federal term at Leavenworth. He will be eligible for parole from Leavenworth in about nine years.

Calls Price Too High.

However, District Attorney O'Dwyer is understood to feel that Lepke's price is too high. It is understood that it has been suggested to his representatives that the best deal Lepke could hope to get would allow him to plead guilty to murder in the second degree in the Brooklyn case and serve the 20-to-life term on his plea concurrently with the 30-to-60-year term in the flour-trucking racket. This would make Lepke eligible for parole in about 17 years. He is now about 43" (R. S3-4).

The *Mirror* and the *News* carried the same story the next day.

Thus the prosecutor's office, on the very eve of the date originally set for his trial, falsely claimed that petitioner had confessed to the prosecutor his guilt of this murder, and as being willing to implicate high City and Government officials in an effort to avoid the punishment of death which, according to all the newspapers, he acknowledged was his own due.

Public sentiment and prejudice were thus deliberately and wrongfully aroused.

When petitioner was brought in for arraignment in the Kings County Court, he was manacled, and a cordon of police had been placed around the Court House, as well as in the corridors, and in the courtroom. Newspaper photographers were admitted in the courtroom and were permitted to take photographs throughout the actual arraignment. Naturally, all this resulted in sensational publicity. The arraignment was adjourned so that petitioner might confer with members of his family in an effort to obtain counsel. But the nature of the custody in which petitioner was held was such that the courtroom resembled an arsenal, and even the Court was moved to express criticism on the score that the measures were so extreme as to prevent him from having any consultation with members of his family (S. M., Arraignment, May 9, 1941, 3-6).

On the adjourned date, the dramatic performance was repeated, except that this time counsel appeared with defendant, and the number of armed guards had been reduced somewhat. But the newspaper photographers were again present in force and again permitted to take photographs of the actual proceedings. Perhaps in fear that the reduction of the number of guards might diminish the extent of the publicity, the Assistant District Attorney took the occasion to make a speech, wholly irrelevant to the arraignment, in which he said, obviously for the benefit of the many newspaper reporters present, that a "milestone" had been reached in law enforcement and that petitioner whom he described by an alias ("Lepke") used throughout the newspaper publicity, had at last been brought before the bar of justice to answer for his crimes (S. M., Arraignment, May 16, 1941, 4). The result sought for was achieved: widespread and prejudicial publicity continued.

In July, 1941, petitioner was advised that the trial would begin on August 4, 1941. By that time, it was apparent that Mr. William O'Dwyer, the then District Attorney of Kings County, would be nominated by the Democratic party as its candidate for Mayor of the City of New York.

In this situation, and believing that because of the unprecedented inflammatory publicity directed against him, he could not obtain a fair trial in Kings County, and that the probability of the candidacy of the District Attorney for the office of Mayor would further minimize the possibility of a fair trial by casting the entire case into the arena of local politics, petitioner's attorneys moved for a change of venue (R. 76 *et seq.*). The motion was denied (R. 167, 168). No separate, intermediate appeal from that decision was available under the New York Criminal Code. The reason assigned by the Justice of the Kings County Supreme Court for the denial of the motion was (R. 165, 166) that it was to be assumed that the publicity adverse to petitioner was state-wide, and, therefore, ran the implication, no less prejudiced vicinage than Kings County could be found. The motion was denied, although out of two hundred residents of Kings County interviewed at random by a trained investigator, a member of the Bar whose integrity was beyond dispute, one hundred and sixty-four said unhesitatingly that they believed petitioner guilty, only two professed to hold the opinion that he was not guilty, and only thirty-four asserted that they had no set opinion of his guilt or innocence (R. 112 *et seq.*). The names and addresses of the persons interviewed were given (R. 116 *et seq.*).

On August 4, 1941, the case was called for trial at the County Court of Kings County before Hon. Franklin Taylor, a Judge of that Court (S. M. 2). A Special or "Blue Ribbon" Panel of two hundred and fifty talesmen had been called. By this time, the District Attorney had been nominated for the office of Mayor. Judge Taylor, who was to preside at the trial, also was a candidate for reelection. Had the case proceeded to trial at that time, it might well have been concluded before the political campaign had actively begun. Before the District Attorney's candidacy for Mayor had become a fact, the District Attorney had desired the case to be tried in August. When,

in August, however, his candidacy had become a fact, he preferred to begin the trial in September. When application was made by the District Attorney for adjournment of the trial until September 15, 1941 (S. M. 35), counsel for defendants, including petitioner, objected (S. M. 38 *et seq.*), and stated pointedly to the Court that they were ready to proceed with the trial on that day (S. M. 38, 39); that they feared that, if the case was adjourned until the middle of September, the time of beginning the active political campaign, it would become a "*political football*" (S. M. 39-45); and that, if the Court desired to serve the convenience of jurors by adjourning the trial until after the heat of the summer, it ought, in fairness to the Court's own reputation, postpone it until the first day after the Election (S. M. 43). The sincerity of counsel was matched by the dissimulation of the presiding Judge who said, in words eloquent for their superficial aspect of fairness and memorable for their complete lack of it (S. M. 54):

"The Court will grant the motion for a continuance of the trial until after Labor Day, but it cannot go over until after election as that would subordinate the trial to the exigencies of a political campaign, which is unthinkable."

On August 5, 1941, at the time when petitioner's counsel protested against further delay, they indicated to the Court that more delay involved the risk of more newspaper attacks upon defendants, and particularly upon petitioner (S. M. 50-53). The Judge assured counsel that the delay would be helpful because it would give the community an opportunity to forget the prejudice engendered by newspaper hostility. This was belied at once by immediately succeeding events.

On August 25, 1941, a tabloid newspaper, the *New York Mirror*, began the publication on a page specially devoted to residents of Kings County, of a "series" of daily articles which asserted that petitioner had been guilty of twenty-seven murders, including the murder of Rosen, the victim

referred to in this indictment. They described petitioner in lurid terms, as the leader of a notorious group of murderers, who had made countless millions of dollars from his criminal activities. These articles completely destroyed any possibility that a fair trial could be accorded petitioner in Kings County. Their circulation was restricted to Kings County; they appeared in a special edition procurable only in Brooklyn. The degree of their prejudicial quality, the extent to which the reader would be incensed against petitioner by them, cannot be described. But since they comprise a part of the record, they are available for the inspection of the Court.

Some excerpts from this series are included here, for the convenience of the Court. The headline and the introductory paragraph, which constitutes the sub-title, of the opening article on August 25, 1941, said:

"MURDER, INC. EXPIRES AS LEPKE GOES ON TRIAL."

Today, Arthur Mefford presents the first installment of a thrilling new series of true-fact articles divulging the behind-the-scene workings of 'Murder, Inc.' the Brooklyn Killers—who murdered to order for rates as low as a dollar—and the crime-packed life story of the gang's boss Louis 'Lepke' Buchalter, who goes on trial for murder on Sept. 15. The murderous crew's deadly power has been broken by Brooklyn's crusading district attorney, William O'Dwyer, but the complete story of their machinations is revealed here for the first time in complete, authentic detail."

The article said in part:

"For weeks the underworld had been buzzing with reports that Lepke feared for his life. That \$50,000 reward was real money, and most of the fugitive's pals were rats of his own kind, men who would kill even one of their own for far less than that.

The underworld, too, said that Lepke feared he might eventually fall before the barking guns of law enforcement officers, just as Dillinger and many others of the nation's public enemies had died.

Former racket associates—triggermen and muscle men—knew that Lepke was not near as tough—personally—as he was reputed to be. He was a man whom the New York police accused of 27 murders, cold-blooded gangland assassinations, but never had they been able actually to place him on the scene with a gun in his hand.

'Lepke hires his killing done,' had always been the police excuse for turning him loose.

.

Everybody knew that Lepke was on the spot, and nobody knew it better than the fugitive himself. For months it had been whispered that prison bars would look like a sanctuary to the man who had drained millions from industry through labor strikes and countless millions more from vast dope-peddling interests.

All that bothered Lepke at this stage of his evil career was the possibility he would not be given the opportunity to make his way safely into some official haven."

The second article started with this paragraph:

"'BIG SHOT' SURRENDERS TO TINKLE OF BROKEN GLASS.

Murder, Inc., the bloody handed ring of New York mobsters which made killing a profession, is as dead as any of its 83-known victims. Brooklyn's crusading District Attorney William O'Dwyer, has seen to that. And Louis (Lepke) Buchalter, erstwhile Public Enemy No. 1, who employed the mob to handle his cruel 'trigger work,' soon stands trial for the murder of an honest, hard working candy store owner. In yesterday's instalment of this intimate, complete story of 'Lepke's' amazing rise to gangland's throne, was told of the intricate underworld arrangements made through Walter Winchell, Daily Mirror columnist, for his surrender."

This article ended with these questions in bold-face type:

"Who is this Lepke? Where did he come from? How did he get the name Lepke; rise to an underworld

throne? The answer to these questions are in tomorrow's issue of the Daily Mirror's Brooklyn Section. Don't miss it!"

Other headlines in the series read:

"LEPKE PUTS LABOR RACKETS ON BIG BUSINESS BASIS.

Louis (Lepke) Buchalter, big boss gangster who never raised his voice, but whose soft-spoken orders packed a terrific wallop—and death if they were disobeyed—was a Lower East Side graduate of the Prohibition Era Crime School. How he started his deadly reign, first clashed with the law and formed his unholy alliance with Jacob (Gurrah) Shapiro, skimpy-brained but strong-muscled ghetto hoodlum; and how he virtually defied the authorities for two decades until he surrendered to head G-Man J. Edgar Hoover, through the collaboration of Walter Winchell, famous Daily Mirror columnist, has been related in three earlier instalments of this intimate, inside-fact article."

"LEATHER TRADE DRIVEN OUT OF CITY BY LEPKE GREED.

How Louis (Lepke) Buchalter, soft-spoken big-shot racketeer, rose from his humble Lower East Side tenement home to New York's underworld throne on a ladder runged with bloodshed and terrorism, and how as America's Public Enemy No. 1—with a reward of \$50,000, dead or alive—on his head, he surrendered to G-Men through Walter Winchell, famous Daily Mirror columnist, have been related earlier in this true fact narrative. Yesterday's instalment told of his tie-up with 'Little Augie' Orgen, once powerful East Side mob leader, and of Little Augie's sudden death in a rain of lead while walking along a ghetto street with his bodyguard, the later gang-slain Jack (Legs) Diamond."

The installment on August 30th began with the headline:

"LEPKE BRINGS MURDER AND VIOLENCE TO FUR TRADE."

And proceeded in part as follows:

"Louis (Lepke) Buchalter, described by New York's famous racket buster, Tom Dewey, as America's No. 1 Public Enemy; a hoodlum who, through widespread bloodshed and terrorism extorted millions of dollars annually from the city's legitimate business men, soon will go on trial in Brooklyn on a first degree murder indictment. He is charged with hiring killers to slay Joseph Rosen, fur trucker whom he forced out of business, in Rosen's humble candy store. Lepke feared Rosen might appear as a witness against him in connection with the trucking racket—one of the many he dominated. Brooklyn's fighting District Attorney, William O'Dwyer, will try to prove Lepke hired the infamous crime syndicate, Murder, Inc., to kill Rosen. The story continues:

By ARTHUR MEFFORD.

"So long as Brooklyn's fighting District Attorney William O'Dwyer is not worried about the eventual outcome of Louis (Lepke) Buchalter's forthcoming trial for the murder of Joseph Rosen, we shall drop the subject for the time being to get back to Lepke's earlier racket activities."

On September 1st, two weeks before the opening of the trial, an article in the series was printed under the headline:

"'BATH OF LYE' PERSUADED FURRIER TO BOW TO LEPKE."

The entrance of Louis (Lepke) Buchalter, boss hoodlum, into New York's multi million dollar fur industry, and the reign of slashings and bludgeoning and acid throwing which he inspired, has already been related in earlier instalments of this inside story of the gangster once described as America's Public Enemy No. 1. Only a few of the legitimate business men ruined by Lepke and his mob had the courage to defy him. And of these, old Julius Bernfeld was the bravest. Now Lepke, now facing the electric chair on a murder indictment, singled out old Julius to make an example of, was related yesterday."

The headline and introductory paragraph on September 2nd said:

**"LEPKE, FREED IN FUR PLOT, MOVED IN ON
TRUCK UNION.**

Louis (Lepke) Buchalter's bid to dominate the entire New York business world hit a snag, temporarily, after his ruthless gangsters had seared the eyes out of old Julius Bernfeld. Greatly to his surprise, Lepke now facing trial on a first degree murder indictment in Brooklyn, found himself and his pal, 'Gurrah' Shapiro, on trial in Federal Court for conspiracy in the fur racket. But he knew all the answers—he thought. Government witnesses were terrorized to the point where even Judge Knox, presiding, called them liars from the bench. Lepke grinned at the Court's discomfiture."

The September 4th story, referring to itself as "factual", began:

"WITH GREED AS CREED LEPKE PEDDLED SNOW.

Louis (Lepke) Buchalter, soon to face a jury in Brooklyn on a first-degree murder indictment, made one very disastrous failure during his long career as boss of New York's underworld union rackets. That was when his hired killer failed to make sure ex-schoolteacher Max Rubin was dead when they shot him through the brain as he emerged from a Bronx subway station. Rubin, who had served Lepke faithfully for almost two years, recovered, though surgeons said he was doomed to die. A bullet through his brain didn't still his tongue, however. He told District Attorney Dewey all he knew of Lepke's racket activities, and gave the Federal authorities their first tip that Lepke was in the drug racket."

And ended:

"Lepke imported dope, not by the ounce, but by tons. How the Government finally proved Max Rubin's revelations of this comes as a big surprise—a literal 'bang,' in tomorrow's installment, exclusive in the Daily Mirror."

On September 5th, Mefford's article began:

"BLAST IN DOPE PLANT BARES LEPKE'S
TIES TO SMUGGLERS.

Lepke wasn't satisfied with having extorted millions out of unions and employers alike in the city's vast garment manufacturing and trucking trades. Even after the first disastrous failure of his entire career of crime—the recovery of ex-schoolteacher Max Rubin from the effects of a bullet through the brain he didn't worry, so powerful were his political connections. Rubin revealed many of his racket operations, including Lepke's venture into counterfeiting, and then dope smuggling, but couldn't furnish proof. How his story was corroborated follows:"

And ended:

"How did Lepke corrupt U. S. officials to make his dream empire of dope come true? Read the answer in tomorrow's Daily Mirror."

The series proceeded to quote witnesses in the custody of the prosecutor as about to testify to petitioner's guilt in his impending trial. These articles are not only lurid beyond description, but convey to the public the assurance of petitioner's guilt at the same time that they depict him, altogether untruthfully, of having committed many other crimes. The fact that he had never been convicted of any of those crimes is acknowledged only insofar as the acknowledgment is urged as a tribute to the ability and honesty of the Brooklyn prosecutor whose assurance of his own ability to convict petitioner of the crime of murder was broadcast.

Because the *Mirror* stories removed all possibility of a fair hearing for petitioner in Brooklyn at a time when the articles were still being published, a new motion for a change of venue was made because of their publication, and because their circulation was limited to Kings County (R. 155 *et seq.*). The motion was denied, without opinion (R. 175, 176).

The very application for a change of venue received only the pretense of a hearing, not even the pretense of consideration. The petitioner was compelled to proceed to trial at a time when the issues in the case would—as the prosecutor well knew—become subordinated to the issues of a political campaign in which both the prosecutor and the presiding Judge were candidates for election. Time and place were manipulated by the prosecution to prevent a fair trial—to afford only the “form” of one.

On September 15, 1942, the “trial” began in the sense that the process of impanelling a jury was started (S. M. 58, 65, 66). Five weeks passed before a jury was impaneled (R. 181-192). When a jury was impaneled, it was neither fair nor impartial. Although the case had been ordered tried before a “Blue Ribbon” panel which is supposedly composed only of talesmen who have sworn to their ability to disregard newspaper impressions, yet an original panel of 250 was exhausted and a new panel of 100 was required before the selection process had been completed (S. M. 2019-2024). In the course of their interrogation, at least one-half of the talesmen called readily admitted that so fixed was their opinion, so strong their prejudice against petitioner in consequence of hostile newspaper propaganda, that they could not sit as impartial jurors. Petitioner asserts here, as he did in the Court of Appeals of New York, that those talesmen, who ultimately were selected as impartial, were prohibited by the Court from expressing their true state of mind, were inhibited by the Trial Judge from admitting the prejudice against petitioner and his co-defendants which had been instilled in their minds by newspaper and local hostility.

Talesmen were threatened with excoriation by the Trial Judge if they admitted prejudice against petitioner.

The process of selecting a jury began at a slow pace. Most of the talesmen said that they were prejudiced and could not sit impartially in the hearing of the case. The Judge himself said that the *Mirror* articles, particularly,

were "RAISING HAVOC WITH THE JURY" (S. M. 614). Suddenly the Court apparently became aware that the leisurely pace of selecting a jury was the subject of adverse newspaper comment. The tempo at once changed. When talesmen asserted that they could not sit impartially because they were prejudiced against defendants the Judge said to the defense that the mere fact of asking about the talesmen's prejudices "is clearly establishing an escape medium for the juror if he does not want to serve. You are putting the words in his mouth. * * * You are doing the thinking for the talesmen" (see Fitzgerald, S. M. 335-6; also Kendy, S. M. 430). A talesman who asserted his inability to be fair was charged with "unwillingness to serve". Another heard himself thus described by the Judge: "I don't think this man is mentally fitted to sit on a jury" (Cone, S. M. 439). This same characterization was also applied to still another talesman who was ordered by the Court to "get out" (Herrick, S. M. 542). Defense counsel remonstrated that these remarks were calculated to intimidate talesmen and prevent a free revelation of their prejudices (Herrick, S. M. 543), but similar judicial comment was repeated in the presence of the panel. Talesmen who said that they would be embarrassed to serve because of friendship with the prosecution or defense counsel were berated as "wholly unfit to have a job as a juror", and as being hostile "to the Court's questions" (Rosenthal, S. M. 726-7). When a talesman was peremptorily challenged by the prosecution the Judge read into the record some prepared remarks on the abuse of the exercise of peremptory challenges (Cleary, S. M. 1295-6; also Kendy, S. M. 426), and his comments were so worded as to furnish the basis for a newspaper story, which sounded as though he was criticizing the defense for deliberately delaying the process of selection, and was so reported.

During the course of the jury selection all thirty peremptory challenges accorded to petitioner and his co-defendants were exhausted before the tenth juror was

selected. The Trial Judge erroneously overruled ten challenges for cause tendered by the defense against talesmen who obviously had been prejudiced against petitioner and his co-defendants. (The Trial Judge invoked a completely different standard in relation to the challenges proffered by the prosecution and erroneously sustained at least six challenges for cause offered by the prosecution.) In consequence petitioner and his co-defendants were prevented from offering peremptory challenges against the two talesmen, Rorke and Link. They were obviously prejudiced against petitioner and his co-defendants. Link had been on the "*Mr. District Attorney*" radio series (S. M. 2600); Rorke was the nephew of a prominent local police official (S. M. 2063).

Link had been excused by Mr. Turkus, the trial assistant (S. M. 2688, 2689), in an earlier murder trial, because at that time Mr. Turkus said that he thought that Link's employment by the radio program "*Mr. District Attorney*" would make it unfair as against defendants in that case for him to sit as a juror. In the voir dire examination of Link in this case Mr. Turkus, interrogating Link at a time when Mr. Turkus knew that defendants had exhausted their peremptory challenges, said in effect to Link: "Would you be prejudiced against me because in the earlier case I thought that you would be unfit as a juror since you might not have been able to be fair to the defendants?" (S. M. 2689). Link said that he would not be prejudiced against the prosecutor and so he was seated.

Rorke was chosen against the background of the knowledge of the trial assistant that in that same earlier case, Rorke, too, had been a talesman (S. M. 2603, 2610), had there heard the name of Capone, one of petitioner's co-defendants in this case, and had been excused on a peremptory challenge (S. M. 2612) by defendants in that case because of his close relationship with a high police official.

Petitioner asserts that, in consequence of the unwarranted insistence by the prosecution that the case be tried at a place where it was impossible for him to obtain a

fair trial since the community had been conditioned against giving him that, and at a time when the issues in the case were deliberately subordinated to the exigencies of a political campaign, the effort to obtain an impartial jury became a laborious futility. Five weeks were spent in the meaningless mouthing of fine phrases about lack of prejudice when, in reality, every talesman called was obsessed by a prejudice springing from his own literacy, originating in attacks sponsored by the prosecution and so ingeniously conveyed, so dramatically expressed, that no human being could fail to be affected. Though all the trappings of a fair trial were present in the examination and selection of the jury, the effort to select an impartial jury, assuming that such men existed, was successfully subverted by the Trial Judge, who used exhibitions of simulated temper to stop talesmen from admitting the prejudice they entertained and who spoke in terms of helpless self-righteousness against the exercise by defense counsel of that minimum degree of acumen which showed itself in the use of peremptory challenges. And by unjustly overruling challenges for cause the Trial Judge ultimately set the stage for the seating as jurors of men who, because exposed to the influence of professional association and family relationship, should never have sat upon the trial of a capital case.

Petitioner asserts that a fair jury was not impanelled *because it could not have been impanelled in the County of Kings in September, 1941.*

The trial itself deteriorated into a mere sham. Before it started the trial assistant, Mr. Turkus, had assured petitioner's brother, Dr. Emanuel Buchalter, that petitioner ought to make a "deal" with the prosecution. Mr. Turkus said to Dr. Buchalter (R. 11): "I don't need any evidence or witnesses to try this case, all I need is the indictment and a summation." He assured him that local prejudice against petitioner was so strong that the mere making of the charge against petitioner would result in his conviction. It is true that Mr. Turkus denied (R. 123, 124) that he had made that statement, but it is significant that he

contented himself with a mere denial; he did not cause any investigation of the incident; no charge of perjury was lodged against petitioner's brother. Mr. Turkus later became a candidate for County Judge, and largely based his own campaign on the conviction of petitioner.

In proving a *prima facie* case against petitioner the People relied only on witnesses who, with one exception, had confessed to the prosecutor participation in the murder of the victim or in other murders committed in Kings County. Despite the confessions by these witnesses of murder, they had not been indicted. For more than a year before the trial they had been in police custody, not at a jail, but at first-rate hotels (R. 761, 762, 1776, 1876, 1877, 2230, 2231), and some of them had been kept together (R. 1023-7). They were, therefore, witnesses who took the stand under the heaviest possible dominance; they knew that upon satisfactory performance as witnesses depended their lives. Each expressed the hope that the prosecution would spare his life; all denied that any promise had been made to them. They had received only a threat from the prosecution, and the threat was that should they tell even so small a lie they would certainly be sent to the electric chair. So the prosecution presented those witnesses as men who could not tell a lie (R. 797, 799, 2343) because they had been assured of *death* were they to fabricate. These witnesses were Berger, Tannenbaum and Bernstein,—all three notorious professional malefactors.

The witness Rubin was the exception. He had not confessed murder to the District Attorney. But he admitted, as he took the stand, that such was his hatred of petitioner that his sole purpose in life was to live for the day when petitioner would be executed (R. 1494, 2399-2401).

In substance the People's case charged that petitioner had directed Berger to identify the victim Rosen to the defendant Weiss (R. 1804-5, 1807, 1811, 1964, 1974, 2053) and that Weiss, through defendant Capone, had arranged for Bernstein to steal an automobile and, after Weiss and others had shot Rosen, drive the assassins from the place

of the shooting. Bernstein, who was on the stand for about a week, never mentioned petitioner. He said that instructions to steal an automobile were given him by Capone, in the company of Weiss, on Friday, September 11, 1936 (R. 702-3, 1166-8), at *one* o'clock in the afternoon (R. 1160-4). Berger testified that he had not been directed by petitioner to identify the victim to Weiss, the alleged assailant, until *six* o'clock on that same day (R. 1962-4), and that it was *nine* or *ten* o'clock in the evening before Weiss traveled with Berger from Manhattan to Brooklyn in order to see Rosen (R. 1971-4), and that it was not until about *ten* o'clock that night that Weiss spoke to Capone (R. 2182), presumably for the purpose of having Capone instruct Bernstein to steal an automobile.

There was, therefore, grave and irreconcilable inconsistency between the testimony of these two key witnesses, Bernstein and Berger. The Trial Judge in his charge in effect instructed the jury to disregard the inconsistency and to assume that petitioner had done earlier preparatory work (R. 3975-7, 3989-90).

Other inconsistencies in the testimony of prosecution witnesses were nullified by the Court's charge in which the jury was told to disregard cross-examination because it was "bit or miss stuff" (R. 3903).

These witnesses, who were ready to testify to anything under the impulse of self-preservation, frequently were confronted with prior contradictions from the records of other cases in which they had testified. They apparently had been schooled to acknowledge earlier testimony at the same time that they refused to recall what it was. Each of them, when his attention was directed to earlier testimony, anticipated the question with the same pat answer: "If it's in the book, I said it." The Trial Judge told the jury that that answer ought to be accepted as frank and truthful for the reason that even defense counsel found it necessary to refer to the stenographic transcript for the exact language of the proceedings of the previous day (R. 3894). Thus the jury was told that memory should

not be expected to be better for experienced facts than for narrated matter. And this consciously false psychological instruction was given for the purpose of extricating the prosecutor's witnesses from their many past and present perjuries.

Since the prosecution admitted that petitioner had no part in the actual commission of the alleged murder (R. 240), it became important to attempt to prove motive. For that purpose the prosecution called the witness Rubin, who testified (R. 1284 *et seq.*) about the reputed assistance rendered to the Amalgamated Clothing Workers Union by gangsters (R. 1290, 1296-1300, 1306), and then to petitioner's alleged motive as against the victim Rosen (R. 1322-67). On his direct examination he ascribed to petitioner fear that the alleged victim, Rosen, might incriminate petitioner in the commission of a misdemeanor (R. 1364-5), and that, therefore, petitioner had expressed impatience with Rosen (R. 1365) and that by innuendo petitioner had threatened Rosen. Throughout a long cross-examination of that witness, the prosecution suppressed a prior contradictory statement of the witness. It made a veiled reference to the possibility that a prior statement might have been given, by the question as to whether, on a prior occasion, Rubin had told the truth to other prosecutors (R. 1486). The form of the question was objectionable and objection to it was sustained. No further effort was made by the prosecution to reveal the existence of such a prior contradictory statement. But such a prior contradictory statement *did* exist, which completely exculpated petitioner from the guilt asserted against him by Rubin's testimony on his direct examination when first called as a witness, and in which statement Rubin had assured the authorities that petitioner was not implicated in this crime. And that statement had been made at a time when Rubin was accusing petitioner of many other crimes, and had conceived his hatred of petitioner. About a week after he had first been called, Rubin was recalled as a prosecution witness (R. 2371), and then as a slight concession to petitioner's

demand (R. 2377) the fact of the existence of this prior statement was revealed, and a portion of the statement was dictated by the Trial Judge into the record (R. 2381-8).

Then, to avoid the whole force of this proof, the Trial Judge assured the jury that it could assume that the prior exculpatory statement was a lie and that the witness' testimony incriminatory of petitioner, was true (R. 3947). He told the jury that the "lie" was excusable, citing "Les Miserables" as a parallel (R. 2404-6). He did not permit the jury to consider whether the exculpation might have been truthful, and the testimony false.

As the prosecution witnesses were called, it developed that they were in custody at local hotels, some of them at the same hotel (R. 1022-7, 2338-40, 2349), and although they said they were denied an opportunity to confer with each other in advance of their testimony, yet the factual situation, as developed on cross-examination, indicated the possibility, even the probability, of such preparatory conferences. The Trial Judge instructed the jury that they must assume that such opportunity did not exist; that they must assume that such conferences did not take place (R. 3956).

The credibility of these witnesses depended greatly on whether they had been promised rewards for their testimony. Despite their denial of such promises, the jury might have assumed that such promises had been made, and to a not negligible extent might have resulted in an effort on the part of these confessed murderers to shape their testimony in a way which would satisfy the prosecution.

The District Attorney, in summation, which counsel for the defendants were restrained from interrupting under penalty of being held in contempt of court (R. 3860), was permitted to pledge his personal integrity on his assurance to the jury that such promises had not been made, that rewards would not be forthcoming (R. 3829, 3830). Aside from the impropriety implicit in such a personal pledge, the fact is that it was false, for rewards were made soon after the end of the trial. Each of the murderers was

turned loose,—scot free—free of any charge; each was given substantial sums from the public funds.

The prosecutor also was permitted to tell the jury in summation, and when defense counsel were under the same restraint, that everybody knew that the defense was false, and no one knew it better than defense counsel, who were the recipients of tainted money which they had received from their clients as fees (R. 3803), and that if defense counsel would not acknowledge it, at least every lawyer spectator in the courtroom was sure of it (R. 3804). Again, by the technique of referring to his opening to the jury and repeating portions of that opening and asking the jury to answer for themselves whether the defendants had brought anyone to court to dispute portions of prosecution testimony (R. 3785, 3786 *et seq.*), the trial assistant was permitted to destroy the constitutional immunity, which is the same in New York as in the federal courts.

Petitioner should have been afforded at least an opportunity to offer a defense. He, however, was denied even the pretense of such an opportunity.

The murder alleged in the indictment was said to have occurred on September 13, 1936. Before that date, petitioner had already been indicted for alleged violation of the Sherman Anti-Trust Act, for which he was tried in the United States District Court for the Southern District of New York, in October and November, 1936. Petitioner, at that time, and for several months before September, 1936, had been the subject of continuous surveillance by police officers of the City of New York. It was the theory of the prosecution, in the present case, that petitioner had contrived the murder of the victim by directing Berger to identify the victim to the co-defendant Weiss (R. 1804-5, 1807, 1811, 1964, 1974, 2053). It was further contended that petitioner received an oral report of the murder from Weiss in the presence of Tannenbaum (R. 2223-4). These alleged conversations, in direction of the murder and in expression of approval of the murder, were said to have been carried on by petitioner immediately before and after

the date of the murder, at an office at 200 Fifth Avenue, New York City.

Petitioner contended, upon the trial, that official police reports existed, regularly kept by police officers of the City of New York, recording their surveillance of petitioner during this period, and that reference to the contents of those reports (if unexpurgated) would demonstrate that, as police officers of the City of New York knew and recorded at that time, petitioner did not see or talk with the witnesses thus produced against him upon the trial (R. 2140-56). Petitioner caused these official police reports, known as "D.D.4's", to be subpoenaed, and produced at the court (R. 2155-6), and requested an opportunity for his counsel to offer them in evidence or at least to examine them so that the names of the police officers could be learned and their identity established, to the end that they could be subpoenaed and caused to testify as to their knowledge of petitioner's activities during the period in question (R. 2140-56). Upon the objection and opposition of the prosecutor, the Trial Judge refused to permit petitioner's counsel to see these reports (R. 2152) and refused himself to look at them even for the limited purpose of revealing to petitioner's counsel the identity of the police officers (R. 2149-50). As a main reason for the refusal, the Court said that the reports were "confidential", and that to reveal their contents would result in communicating to defense counsel confidential information about other crimes (R. 2149).

The Trial Court's charge to the jury was so unfair that it was characterized by Judge Loughran, in his opinion in the Court of Appeals review of this case, as an argument and summation for the prosecution.

In the State of New York, appeals to the court of last resort, the Court of Appeals, in capital cases, are mandatory, and that tribunal is obligated by the New York State Constitution to review the facts as well as the law in a capital case.

That review was not afforded petitioner by the majority of that Court.

The vote for affirmance in the Court of Appeals was four to three. Two opinions were written for affirmance, one by Judge Conway in which Judges Finch and Lewis concurred, the other by Chief Judge Lehman. The Chief Judge did not concur in Judge Conway's opinion.

Judge Conway's opinion contains not a judicial review of the facts, but a review, as Chief Judge Lehman said in a part of his opinion which he himself italicized, of the "facts *which the people claim* were established by the testimony of these witnesses". Judge Rippey (dissenting) said that Judge Conway's opinion was "a summary of the contentions of the people".

The opinion of Judge Conway became an opinion for affirmance because Chief Judge Lehman cast his vote for affirmance. But, in doing that, Chief Judge Lehman admitted that the errors itemized by Judge Loughran in his dissenting opinion had been stated "with characteristic restraint". Those errors received no consideration in the opinion of Judge Conway.

Chief Judge Lehman acknowledged the gravity of the many errors and defects in the case, and said that Judge Loughran had set forth "some". He wrote: "I might have been unwilling if I had been a member of the jury to concur in the result", saying, flatly, that "Evidence coming from a polluted source has failed to remove reasonable doubt of the defendant's guilt from my mind."

The three dissenting Judges expressed their grave doubt of petitioner's guilt. Thus affirmance followed expression of doubt by an actual *majority* of the Court, in a State where it has always been considered the sacred duty of the Court (in accord with all civilized procedure) to reverse if a majority of the Court entertained doubt of guilt.

Thus, although petitioner's appeal resulted in the publication of extensive opinions by the Court and he was accorded all the outward indicia of a review, he was in fact given only a semblance of it.

Lest this be thought an extravagant commentary on the review accorded petitioner in the State Court of Appeals, petitioner refers to some of those errors analyzed in the opinion of Judge Loughran, the existence of which were acknowledged by the Chief Judge, and the content of which was nowhere refuted in the opinion of the other three Judges who voted to affirm. Judge Loughran said, among other things, that the Trial Judge's comments on the discrepancies between the testimony of Bernstein on the one hand, and Berger and Rubin on the other, invaded the province of the jury. "Thus the last word of the judge withdrew from the jury a vital issue of fact and disposed of it in favor of the people as matter of law. This was obvious error." He said that the Trial Judge invaded the province of the jury by assuring the jury that it could accept Bernstein's testimony that "witnesses were not" afforded preliminary opportunity to confer about their testimony. "The Judge was without power so to invade the province of the jury." He said that the Trial Judge erred in permitting the prosecutor to ask the jury to consider whether the defendants had testified in contradiction of prosecution witnesses. "Since none of the defendants was a witness, the whole point of that argumentation was its erroneous accent upon the assertion by them of their constitutional privilege against compulsory self-incrimination. In our judgment, the exception taken thereto was valid."

He said that the Trial Judge erred in permitting the prosecutor to lend his personal integrity to the support of prosecution witnesses. "*A majority of this Court is gravely apprehensive that such diffuse departures by the trial prosecutor from legitimate argument might have unduly prejudiced the jury against the defendants.*" He said that, although the Judge was obligated to deal fairly with all facts, he had expressly disavowed any intention so to do, at the same time that he instructed the jury to disregard cross-examination, and that "as an inevitable consequence of these conceptions of his function, the Judge's treatment

of the proof took on the character of a summation for the people. We will not say such a charge was right." He noted that defendant had proved lack of motive, but that the Trial Judge disregarded defendant's proof and instructed the jury that there was adequate proof of motive as against petitioner, and said: "The Judge was without power so to deal with the effect of evidence as proving the case against Buchalter. At this point again there should have been a presentation of both sides of the issue—and the question of the weight of the evidence also should have been submitted to the jury."

Judge Loughran said that the Trial Judge in consequence of his errors, in consequence of his invasion of the jury's function, had in effect extorted from the jury a finding of petitioner's guilt. "On the whole we find ourselves unable to perceive how the basic finding of Buchalter's distant connection with the actual shooting of Rosen can be taken to have been made *by the jury alone*. * * * We do not see how the conviction of the defendants can be affirmed without annulling the statute which makes the jury in a criminal case the exclusive judges of questions of fact. Nor do we see how an affirmance is possible without deciding that in a criminal case the Trial Judge in his charge *may entirely ignore the evidence and the contentions of the accused* unless in the end some request is made for a different handling of the issues."

Judge Rippey, who came to the Court of Appeals with the profound experience of a Federal District Judge's latitude in the trial of criminal cases, thus characterized petitioner's "trial":

"I also agree with Judge Loughran that the trial was unfair. *In my opinion, the conduct of the trial throughout was so grossly unfair as to leave the defendants without even a remote outside chance of any free consideration by the jury of their defenses, so unfair in fact as to render utterly without force the presumption of innocence to which every person charged with a criminal offense is entitled until his guilt is established by legal evidence beyond a reasonable*

doubt. It does not follow that a new trial should be ordered. There was insufficient legal evidence at the close of the People's case upon which to base a conviction of Capone and the indictment against him should have been dismissed. In spite of the summary of the contentions of the People contained in one of the opinions for affirmance, an analysis of the whole record persuades me that the evidence was insufficient as matter of law to sustain the conviction of any of the defendants of murder in the first degree beyond a reasonable doubt." (Italics supplied.)

Of all this Chief Judge Lehman said:

"As Judge Loughran has, in my opinion, completely demonstrated, the Trial Judge erred at times in ruling on evidence and at times usurped the function of the jury to draw inferences from the evidence and to determine facts. * * * The errors and defects in this case are, it seems clear to me, many. Judge Loughran has set forth some which in his opinion cannot be disregarded. * * * I might wish that the charge had been different * * * I regret many incidents that occurred at the trial. I regret the summation of the prosecuting attorney and his remarks in the course of the trial. I regret some of the rulings of the Trial Judge."

And the Court of Appeals refused to review the question of whether petitioner had been tried before a fair and impartial jury, and whether a change of venue should have been granted.

The widespread attack against petitioner generated by the prosecution before he was brought to trial thus also prevented him from obtaining a fair review of the judgment of conviction.

Petitioner does not here assert that the mere incidence of these errors as such or even their collective existence as mistaken legal rulings in the course of a single trial constitutes the basis for the granting of this petition. Importance is attached to them only to show that in a case where, because of the contrivance of its being held in a hostile community, at a time when hostility originally

engendered by newspaper attacks of unprecedented fury was, if anything, exaggerated by the projection of a political campaign into the case, what seemed inevitable at the beginning of the trial—the impossibility of a fair hearing—became the manifest fact during the course of the trial and attended the case even upon its consideration in the State Court of last resort.

There never was even a remote chance that petitioner could secure a fair trial in Kings County in the Fall of 1941. In the selection of the jury there was the first proof that all petitioner could secure would be the outward mechanics of a trial,—not a fair trial. When, during the course of the trial, the Trial Judge by his rulings prevented petitioner from recourse to official records in order to present his defense, usurped the functions of the jury in appraising the credibility of witnesses, substituted unfounded and unwarranted inferences for evidence, and belittled the defense, the unfairness of the Trial Judge became self-evident. When, further, in the course of the case, the Trial Judge prevented so much as a protest against the prosecutor's accusation that the defense was a fraudulent fantasy and that defendants' counsel had consciously accepted tainted money and, at the same time, assured the jury that no promises had been made to prosecution witnesses, further proof was furnished that the trial was conducted only as a mere matter of form. When the Judge, instead of charging the jury on the law, used the function of a charge to argue that the record proved petitioner's guilt, even the outer pretense of a fair trial had collapsed.

Jurisdiction

The jurisdiction of this Court is invoked under Section 344(b), Title 28, U. S. C. (Sec. 237 of the Judicial Code as amended).

The judgment of the County Court of Kings County of the State of New York, as affirmed by the Court of Appeals in that State, is a final judgment, not further reviewable in any Court of the State of New York. The Federal questions herein presented and urged were raised in the State courts, as is evidenced by the statement in the remittitur of the Court of Appeals of the State of New York, as follows:

"Appellant, in his brief and argument, raised the point that he had been denied his constitutional rights under the Fourteenth Amendment to the Constitution of the United States, and this point was considered and necessarily decided by this Court."

These Federal questions are succinctly set forth in petitioner's brief in support of his motion for a reargument in the Court of Appeals, which is a part of the record before this Court, and which shows that these points were all urged below in the first instance and at first opportunity.

These Federal questions are of substance, and as the brief in support of this petition will develop, were decided in a manner not in accord with the applicable decisions of this Court (Rule 38, subd. 5[a] of the Supreme Court of the United States).

Questions Presented

1. Whether petitioner has been deprived of due process of law by a denial of motions for a change of venue from a place where public opinion had been irrevocably prejudiced against him by a lengthy series of newspaper articles

and interviews, and where local passions were inflamed and where prospective jurors had been conditioned to assume his guilt.

2. Whether petitioner was denied due process of law by the refusal of the Court of Appeals of New York to review the rulings of the Trial Judge upon the challenges to prospective jurors and to jurors impaneled, where, by the State Constitution, the Court of Appeals is required to review the facts as well as the law upon an appeal in a capital case; and whether a State statute declaring that the rulings of the Trial Judge upon the challenges to special jurors are not reviewable is constitutional.

3. Whether petitioner was denied due process of law by the refusal to make available to him certain official records of the Police Department of the City of New York so as to permit him to call as witnesses police officers of the City of New York, to the end that such officers might be examined concerning their observations at a time and place vitally material to the charges against petitioner.

4. Whether petitioner was denied due process of law by the repeated unfair rulings and comments of the Trial Court during the cross-examination of witnesses for the prosecution, and by the rulings, comments, charge and conduct of the Trial Court, belittling the defense and improperly construing for the jury the probative force of evidence adduced, so that the jury was misled.

5. Whether petitioner was deprived of due process of law by the refusal of the Trial Court to rebuke and repress improper, prejudicial and untrue statements by the prosecuting attorney in his summation to the jury.

Reasons Relied On for Granting the Writ

Petitioner submits that, although he entered the trial burdened by the reputation of being a notorious enemy of society, yet civilized society, as represented by the State of New York, could well have afforded him a fair and impartial trial, pursuant to due process of law,—the more so because petitioner came into court already under prison sentences extending over his natural life.

Petitioner was deprived of a fair trial because, although there was no need for it, he was tried in a county whose residents had been astutely conditioned to believe him guilty before the trial began. He was tried at a carefully selected time when the trial itself could be exploited in the interests of a local political campaign in which both the prosecutor and the Trial Judge were candidates for high elective offices. He was tried before a jury which was not impartial. During the course of his trial, the prosecutor was permitted to make untrue representations of fact. At the conclusion of the trial, the Judge delivered a summation in the guise of a so-called charge, which, in the opinion of at least three Judges of the Court of Appeals of New York, constituted a vigorous and unfair argument for conviction. On review, the Court of Appeals of New York declined even to consider the question of whether the jury had been impartial. It declined also to consider whether petitioner had been deprived of an opportunity to present his defense out of documents in the possession of the prosecution itself, and which petitioner asserted, if unpurgated, would conclusively *prove his innocence*.

All of the reasons why this petition ought be granted can be reduced to this:

That it is a paradox of the administration of the criminal law that the security of good and honest men against abusive persecution is only so strong as their insistence that bad men charged with the commission of heinous crimes be accorded a fair hearing before conviction. Peti-

tioner was denied a fair hearing, and it is no answer to say that he came to court with an ominous past record. He was entitled to a fair trial on this charge, for which his life was at stake. He was deprived of that fair hearing, denied the due process of law. Unless the answer to each of the Questions Presented is "No", this Court should rule that, under the Federal Constitution, sinner as well as saint is entitled to the benefit of the basic constitutional securities and guaranties when he comes to judgment.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari should be granted.

LOUIS BUCHALTER,

Petitioner,

By I. MAURICE WORMSER,

J. BERTRAM WEGMAN,

JESSE CLIMENKO,

Counsel for Petitioner.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1942

No.

LOUIS BUCHALTER,

Petitioner,

v.

PEOPLE OF THE STATE OF NEW YORK.

**BRIEF IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI**

Opinions Below

The four (4) opinions of the Court of Appeals of the State of New York upon the appeal to that Court are reported officially in Weekly Adv. Sheets No. 189, Dec. 12, 1942, 289 N. Y. 181. The *per curiam* opinion of that Court denying the motion for reargument of the appeal, has not yet been reported officially.

Jurisdiction. Questions Presented. Etc.

Reference to the statute under which the jurisdiction of this Court is invoked, and a statement of the questions presented, as well as a statement of the case, will be found in the petition.

Summary of Argument

Forcing the petitioner to trial at a place where and a time when a fair trial was impossible violated due process of law. Motions for a change of venue were timely made, and should have been granted. Failing that, the motion for an adjournment of the time of trial until after the election campaign should have been granted. The public clamor for the conviction of the petitioner, which undoubtedly was instituted and engineered by the prosecution, and thereafter uncontrolled, was aggravated by requiring the trial to proceed during the course of the campaign of the Trial Judge for re-election and the heated campaign of the prosecuting District Attorney for election to the office of Mayor of the City of New York.

The petitioner was denied due process of law by the overruling of challenges to prospective jurors and to jurors impaneled, which were based upon the bias, the lack of impartiality, and the preconceived opinions of such prospective jurors and jurors impaneled. The refusal of the Court of Appeals of New York to review such rulings by the Trial Court was a denial of due process of law, because under the Constitution of the State of New York, a defendant in a capital case, as this was, is entitled to a review by the Court of Appeals of the facts as well as the law; furthermore, since the petitioner raised the question that he had been denied due process of law by the failure to impanel a fair and impartial jury it was the duty of the State Court of Appeals to examine the substance of rulings of the Trial Judge upon the challenges, as well as the form thereof, to ascertain whether, in fact, due process of law was denied.

The petitioner was denied due process of law by the rulings of the Trial Judge, sanctioned by the majority of the State Court of Appeals, which removed from the consideration of the jury certain fundamental questions of fact and substituted for the judgment of the jury thereon

the opinions and views of the Trial Judge, to the end that the jury was misled and the Trial Judge became the arbiter of facts as well as law.

Petitioner was denied due process of law by the refusal of the Trial Judge to rebuke the prosecutor and instruct the jury to disregard improper statements by him in his summation, and by the implied approval by the Trial Judge of the injection by the prosecuting attorney, in his summation, of the issue of his personal integrity and his untruthful assurance to the jury that no promises or inducements were or would be given to the witnesses for the prosecution in return for their testimony.

The petitioner was denied due process of law by the refusal of the Trial Judge, sustained by the majority of the Court of Appeals, to accord the petitioner access to official records of the Police Department of the City of New York which had been produced at the trial.

Petitioner was denied due process of law by the failure of the Chief Judge of the New York State Court of Appeals to vote for a reversal of the conviction although the Chief Judge had, as he expressed in his opinion, a reasonable doubt of the guilt of the defendants, since under the precedents and authority of the Court of Appeals, a judgment of conviction in a capital case must be reversed if there is a reasonable doubt of guilt.

ARGUMENT

I

"Due process of law" as guaranteed by the Fourteenth Amendment encompasses the assurance of a fair trial in the courts of a State.

The questions presented upon the facts, as stated in the petition, must be examined in the light of basic principles. These principles are here enunciated as a preface to the presentation of petitioner's argument.

In *Snyder v. Massachusetts*, 291 U. S. 97, Mr. Justice Cardozo, speaking for the majority, held that the procedure there involved did not offend "due process" because in accord with State law, and that the possibility of prejudice to a defendant from that State law was "gossamer". It will be here urged that the procedure below was offensive to local law as well as to the concept of due process of law under the Fourteenth Amendment of the Constitution which Mr. Justice Cardozo described (*loc. cit.*, p. 122):

"Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof."

How much the more so when the pressure of the proof in this case was so light that an actual majority of the State Court of Appeals expressed their own reasonable doubt of guilt, and one of the Judges said the proof was so inadequate as in his opinion to require a dismissal of the indictment!

Mr. Justice Roberts in his dissenting opinion in the case cited, speaking for the minority, expressed the rule thus (p. 127):

"In whatsoever proceeding, whether it affect property or liberty or life, the Fourteenth Amendment commands the observance of that standard of common fairness, the failure to observe which would offend men's sense of the decencies and proprieties of civilized life."

And at page 137:

"But where the conduct of a trial is involved, the guaranty of the Fourteenth Amendment is not that a just result shall have been obtained, but that the result, whatever it be, shall be reached in a fair way. Procedural due process has to do with the manner of the trial; dictates that in the conduct of judicial inquiry certain fundamental rules of fairness be ob-

served; forbids the disregard of those rules, and is not satisfied, if, though the hearing was unfair, the result is just."

The Fourteenth Amendment in its guaranty of due process against invasion by the States, covers those cases where privileges and immunities which are of the essence of liberty and justice have been invaded. *Palko v. Connecticut*, 302 U. S. 319.

II

Due process of law was denied by the refusal to change the place of trial or, at the very least, to postpone the time of trial.

It has been shown in the petition that the indictment of petitioner was obtained in April, 1940, of a murder alleged to have been committed in September, 1936. For more than a year there was a deliberate, studied effort to inflame the prejudices of the populace of Kings County against petitioner. This cannot be doubted by one who examines the samples of the newspaper articles which are part of the record.

In a county with a populace exceeding two and a half million persons, it might well be assumed that there were some who might not have been familiar with the name and reputation of a particular alleged malefactor; here it was shown that a trained investigator of unimpeachable integrity questioned 200 persons chosen at random in that community. Every one of them was familiar with the charges against petitioner. Every talesman who was examined had heard and read of the alleged activities of petitioner, and was familiar with the charge against him in the instant case.

Thus, there was accomplished, in this cosmopolitan and extensive community, a result as insidious as the incitement to violence in a village. And this was not a result

unlooked for by the prosecuting attorney; it is beyond cavil that he was responsible for this propaganda.

When the stage had been sufficiently set, when over a long period of time the collective mind of the community had been sufficiently conditioned,—more than a year after the indictment was obtained,—the application was made to bring petitioner from the Federal Penitentiary at Leavenworth, Kansas, to the County Court of Kings County to answer the charge of the indictment.

It had been reported earlier in the press that petitioner had acknowledged to the District Attorney his guilt of this crime. That, of course, was a lie. As the time of trial approached, the District Attorney undertook to make assurance doubly sure that none might consider the possibility of petitioner's innocence. He caused to be circulated fresh stories of attempted bargaining by petitioner for the privilege of pleading guilty to a lesser degree of murder, for which privilege he would pay by giving evidence against prominent people. That was a lie.

The "wild-west" atmosphere of the courtroom on the first arraignment was calculated to and did create a further impression in the public mind that petitioner was a horrendous creature. The flamboyant utterances of the prosecutor at the second arraignment added further color to the picture.

The pressure of the fixed opinion of an entire city is not much different in its effect upon jurors, at least psychologically, from the presence of a mob.

The time originally fixed for the commencement of the trial was before the active period in the election campaigns of the District Attorney and the Trial Judge. So, although all the defendants asked either that the trial commence immediately or, if adjourned at all, that such adjournment be until after Election Day, a time was set so as to bring the trial into the very midst of the political campaign.

Then the fires of publicity were rekindled, particularly in newspapers extensively circulated within the County of Kings, but not distributed outside its borders.

All of this having been shown, it was a clear abuse of justice and a denial of due process of law to refuse to change the place of trial, or, at the very least, to postpone the time of trial. *Quinn v. State*, 54 Okl. Cr. 179, 16 Pac. (2d) 591, 593-594; 54 Harvard Law Review 679; *People v. McLaughlin*, 150 N. Y. 365, at 375-376.

The demeanor, utterances, rulings and charge of the Trial Judge, to which reference has been made in the petition and specific instances of which will hereinafter be discussed, demonstrate that he, too, was imbued with a deep prejudice against petitioner, no doubt enhanced by the coincidence of his own campaign for re-election. Apposite, therefore, is the language of Mr. Chief Justice Taft in *Tumey v. Ohio*, 273 U. S. 510, at page 532:

"Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law."

III

A fair and impartial jury was not impaneled. A fair and impartial Judge did not preside at the trial.

As petitioner had anticipated and had argued in seeking a change of venue, it did indeed prove impossible to impanel a jury free of prejudice and bias. The facts having been set forth in the petition, they are not reiterated.

The defendants were compelled to exhaust their peremptory challenges to exclude jurors against whom challenges for cause had been erroneously overruled. The State Court of Appeals refused to examine these rulings on the ground that the rulings of the Trial Court upon such challenges were, by statute, not reviewable. But that holding is clearly erroneous and itself a denial of due process

of law as well as that due process of law was denied by the original rulings in the Trial Court.

The prosecutor opposed review of these rulings on appeal, and on the appeal, and on the motion for reargument, the Court of Appeals said that because petitioner's counsel had "consented" to the impanelling of a special jury such review was foreclosed.

This was wrong both on the facts and on the law.

Petitioner's counsel had not consented. The papers on that motion are a part of the record; from them it clearly appears that the Court at *nisi prius* in granting the motion for a special jury misstated the fact in recording that there was consent. All that petitioner's counsel said (Affidavit of Hyman Barshay, par. 6) was that he did not object to so much of the motion as asked that a special jury be summoned.

(And the section of the statute relied on below (Judiciary Law, Sec. 749aa, subd. 7, printed in the appendix) says only that such rulings on challenges for "actual bias" shall be final. The rulings complained of were *not* upon such challenges, but for "implied bias" and for [&]prejudice.)

If extended to the scope given that section by the State Court of Appeals, then measured against the requirements of the New York State Constitution (Art. VI, Sec. 7, printed in the appendix), that provision of the special jury statute is repugnant to the Fourteenth Amendment. The failure to object to the motion is not a waiver of that privilege of petitioner.

To say that petitioner "consented", because his attorney did not oppose the motion for a Special Jury, to waive his right to a review of the rulings upon the challenges to prospective jurors and to jurors who were actually impanelled, and to rely upon such so-called "consent" to avoid such review, is tantamount not only to an acknowledgment that the rulings were as wrong as petitioner charges, but also to an assertion that petitioner could and did waive his right to a fair and impartial jury.

Even if petitioner himself had formally consented—as he had not—the law does not permit a waiver of so fundamental a right. At least, prior to the decision of this case, that is what the New York State Court of Appeals had held. *People ex rel. Battista v. Christian*, 249 N. Y. 314, at 318;

“ * * * the rule can be deduced that waiver is not permitted where a question of jurisdiction or fundamental rights is involved and public injury would result. A privilege, merely personal, may be waived; a public, fundamental right, the exercise of which is requisite to jurisdiction to try, condemn and punish, is binding upon the individual and cannot be disregarded by him.”

Nothing is more fundamental than the right to trial by an impartial tribunal. The Constitution of the State of New York (Article I, Sec. 2, printed in the Appendix) specifically forbids the waiver of trial by jury in a capital case.

The New York Court of Appeals is required to examine the facts as well as the law on an appeal in a capital case, such as this was, and the right of appeal in a capital case is guaranteed by the New York State Constitution, Article VI, Section 7. *People v. Crum*, 272 N. Y. 348. Whether the Trial Court has been properly constituted is certainly a question both of fact and law.

Due process of law is not satisfied by a mere adherence to form. The substance must be examined. *Norris v. Alabama*, 294 U. S. 587; *Whitney v. California*, 274 U. S. 357.

If the ruling below is correct then due process of law would be satisfied although impaneled upon the jury were close associates of the prosecuting attorney; due process of law would become an empty phrase. Cf. *Brown v. New Jersey*, 175 U. S. 172.

The strictures of the Trial Judge undoubtedly interfered with a free expression of the prejudice which may have been entertained by many of the jurors impaneled. Perhaps the turn of mind of the Trial Judge may be deduced from his conduct during the impaneling of the jury. It

is also shown by his full justification and approbation of an insulting outburst by one of the self-confessed criminals brought to the witness stand by the prosecuting attorney who, from the stand, called one of defense counsel, a distinguished former Judge of the Court of General Sessions of New York, "a filthy swine" (R. 2416). Particularly apt is the opinion of the Supreme Court of Pennsylvania, *per Maxey, J.*, in *Commonwealth v. Petrillo*, 338 Penna. 65, 12 Atl. (2d) 317, at page 331:

"The language just quoted is not in keeping with that 'orderly proceeding adapted to the nature of the case', which this court said in *Com. v. O'Keefe*, 298 Pa. 169, 172, 148 A. 73, 74, was a part of that 'due process of law' which in this country is a traditional safeguard of an accused. In *Powell v. Alabama*, 287 U. S. 45, 55, 53 S. Ct. 55, 60, 77 L. Ed. 158, 84 A. L. R. 527, the Supreme Court of the United States, in an opinion by Mr. Justice Sutherland, declared that trials for felonies such as charged in this indictment should proceed 'in the calm spirit of regulated justice'.

" * * * There is no other case which calls for such strict impartiality on the part of a trial judge and such fearless adherence by him to these 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' (*Hebert v. Louisiana*, 272 U. S. 312, 316, 47 S. Ct. 103, 104, 71 L. Ed. 270, 48 A. L. R. 1102) as those cases which have been sensationalized in the public press. In all such cases there is much public *prejudgment* and this is always adverse to *any* of those at whom the finger of accusation points. Anyone mentioned as *in any way connected* with those accused is in the public mind already condemned. No trial judge should permit his judgment and sense of good taste to be warped because of his official participation in a 'front page' case." (The emphasis is the Court's.)

IV

The Trial Judge deliberately invaded the province of the jury and misled it.

Due process of law requires that the jury be permitted to decide questions of fact. In New York State, a Trial Judge is required to refrain from expressing an opinion on the facts. *People v. Ohanian*, 245 N. Y. 227, at 232-233. In deciding whether due process of law was had, this Court may consider whether the proceedings below were consonant with the law of the State. *Snyder v. Massachusetts*, 291 U. S. 97.

Some few examples of this aspect of the misconduct of the Trial Judge which were not corrected by the Court of Appeals have been indicated in the petition and will not be repeated beyond an enumeration which leads inevitably to the conclusion that these were not just mistakes of law, but something more sinister:

1. The jury was instructed to disregard patent inconsistencies between the testimony of the witness Bernstein on the one hand and the witnesses Berger and Rubin on the other, and to assume that there was no inconsistency; instead of being permitted to treat that inconsistency as impairing the credibility of these witnesses.

2. The jury was instructed to consider as false a prior exculpatory statement by the People's witness Rubin and to take as true his testimony in the case on trial, and even worse, to treat the falsity of the prior statement as justified and as having no impeaching effect upon the witness' credibility; instead of permitting the jury to treat the prior exculpatory statement as true, if it so found, and the testimony in the case on trial as false.

3. The jury was instructed to assume the People's witnesses had not conferred in advance of the trial; considering what was elicited on cross-examination of these witnesses the jury should have been allowed to consider whether there had in fact been such pre-trial conferences, and, if satisfied that there were such, to consider whether that impeached the credibility of the witnesses.

4. The Trial Judge sanctioned grossly improper (and in at least one instance untruthful) statements and arguments by the prosecutor in his summation. *Cf. Berger v. United States*, 295 U. S. 78.

5. The Trial Court omitted all reference to the facts elicited on cross-examination of the prosecution's witnesses, belittled that cross-examination and communicated to the jury his view that it was entitled to have little, if any, weight in their deliberations.

This experienced Trial Judge knew better than those rulings would indicate. But his judgment was warped. In *Commonwealth v. Petrillo*, 338 Penna. 65, 12 Atl. (2d) 317, at page 332, it was said:

"The law confers on no judge the power of *pre-judgment*. A defendant charged with crime is not likely to receive a fair and impartial trial, if the judge from the beginning exhibits an attitude which conveys to the jury the impression: 'Here is a man guilty of an atrocious murder but of course we have got to go through the *form of a trial* before we send him to the electric chair.'" (Emphasis is the Court's.)

V

Depriving the petitioner of an opportunity to offer evidence in his defense was a denial of due process.

As shown in the petition, there were certain records of the Police Department of the City of New York which, if unaltered, might have demonstrated that certain meetings which prosecution witnesses testified had occurred, had, in fact, never taken place. If the falsity of the testimony of the prosecution's witnesses regarding these alleged meetings had thus been established, petitioner's innocence of the crime charged would have been demonstrated.

Petitioner had subpoenaed these records. They were produced in Court by the Police Department pursuant to the subpoena, but delivered to the prosecuting attorney who refused to permit petitioner access thereto. The Trial Court refused to permit petitioner to offer these records in evidence, refused to permit petitioner's counsel to examine the same, refused to allow them to be counted, refused himself to examine them, and refused to allow petitioner's counsel to ascertain the identity of the police officers who were engaged in maintaining surveillance of petitioner's whereabouts during the time in question, so that petitioner was denied an opportunity to seek out these officers in order to obtain their testimony to refute the prosecution's witnesses.

Upon the appeal, the opinions of the members of the Court of Appeals omitted all reference to the error alleged by petitioner to have been committed in this respect. Upon the motion for re-argument, however, the *per curiam* opinion said that the majority of the Court had examined those records and did not believe that they were entitled to much weight as evidence.

It was not for the Court of Appeals, or at least for the majority of the Judges of that Court, to decide whether or not this evidence had or lacked weight; that was a

question for the jury to decide. Nor is it explicable how the majority of the Court of Appeals could have known what would be the testimony of the police officers who made those reports, had it been possible for petitioner to summon those officers as witnesses at the trial. The situation is not dissimilar from that in *Saunders v. Shaw*, 244 U. S. 317, where a defendant had been deprived of an opportunity to offer evidence, and a majority of the State Appellate Court thought the evidence of no force. Mr. Justice Holmes, writing for this Court for reversal, said (p. 319) of this idea that the evidence was of no force:

"It may turn out so, but we do not see in the record an absolute warrant for the assumption, and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in."

The refusal of the State to make available to the defendant evidence in its possession constitutes a denial of due process of law. *Mooney v. Holohan*, 294 U. S. 103.

VI

Requirements of due process of law were ignored in the decision of the New York State Court of Appeals.

Under this heading it is not intended to review those errors involving a denial of due process of law to which reference has been made in this brief, nor to repeat the argument that the refusal to correct those errors was an abuse of due process of law on the part of the New York State Court of Appeals.

What is here urged is that, upon the very face of the opinions rendered in that Court, controlling and compelling authority requiring a reversal of the conviction even if all other errors are disregarded, was ignored by the learned Chief Judge whose vote was the deciding factor.

Due process of law is denied a defendant if the judgment of a State Court is a departure from the clear requirements of State law. *Snyder v. Massachusetts*, 291 U. S. 97; *Pyle v. Kansas*, 87 L. Ed. 154, Adv. Op., Dec. 21, 1942.

The Chief Judge said in his opinion that the incriminating testimony came from "witnesses whose credibility has been irretrievably impeached" and that evidence from so polluted a source had "failed to remove reasonable doubt of the defendants' guilt from my mind".

The most recent interpretation of the pertinent provisions of the Constitution of New York upon this subject is found in *People v. Crum*, 272 N. Y. 348, in which opinion the present Chief Judge, then an Associate Judge, concurred. The then Chief Judge of the New York Court of Appeals (Crane, J.) there said (p. 350) that the Constitution of New York, Article VI, Sec. 7, requires the Court of Appeals to review the facts in a capital case, and explained:

"A review of the facts means that we shall examine the evidence to determine whether in our judgment it has been sufficient to make out a case of murder beyond a reasonable doubt. *We are obliged to weigh the evidence and form a conclusion as to the facts.* It is not sufficient, as in most of the cases with us, to find evidence which presents a question of fact; it is necessary to go further before we can affirm a conviction and find that the evidence is of *such weight and credibility* as to convince us that the jury was justified in finding the defendant guilty beyond a reasonable doubt.

"A reading of this record causes me to hesitate. I am not convinced. *I have a reasonable doubt* which I shall attempt to explain and which, in my judgment, *compels us to reverse this conviction* and grant a new trial." (Emphasis added.)

Being left with a reasonable doubt and doubting the credibility of the prosecution's witnesses—the vote of the Chief Judge for affirmance here, measured against the requirements of his office, as enunciated in *People v. Crum*, *supra*, operated to deprive the petitioner of due process of law.

CONCLUSION

In *Commonwealth v. Petrillo*, *supra*, from which several quotations have been excerpted, after stating that every accused in an *American* court of justice is entitled to a fair and impartial trial (p. 332) and "It is the duty of the Appellate Courts to see to it that every defendant gets such a trial", the Court said that the Fourteenth Amendment of the Constitution of the United States (as well as the Constitution of the Commonwealth of Pennsylvania—and it may be noted that that is equally true of the Constitution of the State of New York) guarantees (p. 333) "in substance, to one accused of crime not only the forms but also the *fundamentals* of a fair trial." Until the present case was decided, the New York State Court of Appeals held true to those principles.

"Whether a guilty man goes free or not is a small matter compared with the maintenance of principles which still safeguard a person accused of crime" (Pound, J., later Chief Judge, in *People v. Barbato*, 254 N. Y. 170, at 178).

Those great principles, that Court had said, "must protect all who come within its sphere, whether the person who invokes its protection seems to be sorely pressed by the weight of the inculpatory evidence in the case or not. It cannot alter, for the purpose of securing the conviction of one who may be called or regarded as a *great criminal*, and yet be invoked for the purpose of sheltering an innocent man. *In the eye of the law all are innocent until convicted in accordance with the forms of the law and by a close adherence to its rules*" (Peckham, J., in *People v. Sharp*, 107 N. Y. 427, at 476-477).

But *not* in this case: Shackled not alone by the manacles with which he was led into the courtroom, burdened not only with prison sentences covering the balance of his natural life, this petitioner carried upon this trial the

opprobrium of the carefully manufactured hostility of the community in which he was tried, the onus of having his fate determined by a jury improperly and unfairly selected and predisposed to a belief in his guilt. Tried before a Trial Judge whose prejudice and animus were so deep-rooted as to extend to and impale defense counsel, this petitioner was met even in the New York State Court of Appeals with a departure from the established doctrines of that Court.

As stated recently by Mr. Chief Justice Stone in *Hill v. State of Texas* (316 U. S. 400):

"Not the least merit of our constitutional system is that its safeguards extend to all—the least deserving as well as the most virtuous."

In sum, there was no due process of law below. A writ of certiorari should issue.

Respectfully submitted,

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APPENDIX

The relevant portions of constitutional and statutory provisions to which reference is made in the foregoing brief:

Constitution of the United States

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York State Constitution

ARTICLE I, SECTION 2

TRIAL BY JURY; HOW WAIVED.

Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense.

ARTICLE VI, SECTION 7

JURISDICTION OF COURT OF APPEALS.

The jurisdiction of the court of appeals, except where the judgment is of death, or where the appellate division, on reversing or modifying a final judgment in an action or a final order in a special proceeding, makes new findings of fact and renders final judgment or a final order thereon, shall be limited to the review of questions of law; but the right to appeal shall not depend upon the amount involved.

Appeals may be taken to the court of appeals in the classes of cases enumerated in this section.

In criminal cases, directly from a court of original jurisdiction where the judgment is of death, and in other criminal cases from an appellate division or otherwise as the legislature may from time to time provide.

In civil cases and proceedings as follows:

(The remainder of this article is omitted as not relevant.)

New York Judiciary Law

SECTION 749-aa. SPECIAL JURORS IN CERTAIN COUNTIES.

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7. Challenges; trial. The parties to such an action shall have the same number of peremptory challenges and the same challenges for cause to be tried in the same manner as upon a trial with an ordinary jury. The rulings of the trial court, however, in admitting or excluding evidence upon the trial of any challenge for actual bias shall not be the subject of exception. Such rulings and the allowance or disallowance of the challenge shall be final. Upon the formation of a special jury as hereinbefore provided the issue must be tried by such jury as prescribed by the code of criminal procedure or the civil practice act with respect to a jury trial in a criminal or civil action with an ordinary jury.

• • • • •

Judicial Code of the United States

SECTION 237, AS AMENDED, 28 U. S. C., SECTION 344.

(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph: nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.